REMARKS

Claim Status

Claims 1-14 are pending in the present application. Claim 2 has been amended. No additional claims fee is believed to be due.

Rejection Under 35 USC §103(a) Over Tachibana

Claims 1-10 and 12-14 have been rejected under 35 USC §103(a) as being unpatentable over Tachibana *et al.* (US 5,412,004). The Office asserts that the limitations currently claimed by Applicants are all taught with the exception of the droplet size distribution range of the discontinuous phase, the average particle size of the emulsifying crosslinked siloxane elastomer, and the amount of air contained in the composition. Furthermore, the Office reasons that it is within the skill in the art to select optimal parameters in a composition in order to achieve a beneficial effect. Therefore it would have been within the skill in the art to select optimal droplet size and particle size in the compositions of Tachibana for aesthetic purposes. This rejection is traversed for two reasons. First, Tachibana does not establish a *prima facie* case of obviousness because it does not teach or suggest all of the claim limitations of Claims 1-10 and 12-14. Second, even if a *prima facie* case was established, the obviousness argument is overcome by the showing of unexpected results in the enclosed 37 CFR 1.132 declaration. Therefore, Applicants respectfully assert that the claimed invention is unobvious and the rejection should be withdrawn accordingly.

Tachibana does not teach or suggest all of the claim limitations of Claims 1-10 and 12-14 and, therefore, does not establish a *prima facie* case of obviousness (see MPEP 2143.03). Specifically, independent claim 1 is directed to a stable multiphase emulsion composition comprising, *inter alia*, a droplet size distribution range of from about 0.1 microns to about 100 microns. Independent claim 14 is directed to a cosmetic composition comprising, *inter alia*, an emulsifying crosslinked siloxane elastomer having an average particle size less than 20 microns. The Office admits that Tachibana does not disclose either of these claimed features.

Even if a *prima facie* case has been established, the presumption of obviousness has been overcome by a showing of criticality or unexpected results in the specification.

The present case identifies a need to prevent agglomeration of solid particles in cosmetic compositions. *See* specification page 1, line 24 to page 2, line 18. The Applicants addressed this need by disclosing a droplet size distribution range of the discontinuous phase and an average particle size of the emulsifying crosslinked siloxane elastomer, as evidenced by the below excerpts:

> It has now been found, however, that cosmetic products can be formulated wherein the agglomeration of solid particles contained therein is minimized and wherein the skin deposition control is improved using the technology hereinafter described. Specifically, it has been found that the use of emulsifying type elastomers aid in controlling agglomeration of solid particles dispersed within the discontinuous droplet phase and provide stable emulsions supporting discontinuous phase droplets having a particle size greater than 20 microns. Moreover, when the cosmetic products of the present invention are applied to the skin, solid particles having a broad particle size distribution are capable of being uniformly deposited on the skin. Without being limited by theory, these solid particles are delivered to the skin by means of emulsion droplets having a broad droplet size distribution. Specifically, the solid particles, even those having a particle size greater than 20 microns, are dispersed within and/or at the droplet interface of the emulsion system such that capillary-induced agglomeration of the particles is confined within the space or volume occupied by the droplet, thereby providing a more even distribution of the broad range particles on skin. Additionally, the droplets serve as a barrier preventing agglomeration as a result of application shear. Accordingly, good coverage of the skin and a natural appearance of the skin is provided. *See* specification page 2, lines 19-34.
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> The discontinuous phase, preferably, forms droplets having a droplet size distribution range of from about 0.1 microns to about 100 microns. More preferably the discontinuous phase droplets have a droplet size distribution range such that at least 20%, preferably 15%, more preferably 10% of the droplets have a droplet size of greater than 40 microns, more preferably greater than 60 microns, most preferably greater than 75 microns, and optimally greater than 40 microns. *See* specification page 11, line 30 – page 12, line 2.
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> Preferably the powders of the present invention have a particle size such that the average chord length of the powder particles range from about 0.01 microns to about 100 microns, preferably from about 0.1 microns to about 50 microns, more preferably from about 1 micron to about 20 microns. *See* specification page 13, lines 4-7.

Tachibana neither identifies a need to prevent agglomeration of the solid particles in a cosmetic product or upon application to the skin, such as in fine lines and wrinkles, nor does Tachibana disclose a manner of accomplishing the same. Tachibana simply addresses the need to increase viscosity of a composition. Thus, there is no motivation or suggestion to modify the Tachibana composition to arrive at the claimed composition.

Further, the accompanying November 2, 2007 Sunkel Declaration, made pursuant to 37 CFR 1.132, is sufficient to establish criticality or unexpected results (see MPEP §716.01(a)). Sunkel asserts that it is not within the ordinary skill in the art to select the droplet size and particle size disclosed in the claimed composition. A formulator needs prior knowledge of the physical dimensions of the emulsifying composition he or she is working with and cannot rely on mixing or agitation energy, for example, to formulate within a given droplet size, because with large emulsifying silicone gel particles, no matter how much or how strong the mixing, ultimately droplets are going to coalesce to a size that the gels can stabilize by packing around the drop. *See* Sunkel Declaration, page 2. The claimed particle size and distribution of the stable multiphase emulsion composition influence not only droplet size, but also sensory benefits. Thus, these features are critical to the present composition; they are not simply optimal parameters one of ordinary skill in the art would select.

In view of the above, Applicants submit that claims 1 and 14, and the claims depending therefrom, are patentably distinct from Tachibana and Applicants request withdrawal of the rejection.

Rejection Under 35 USC §103(a) Over Tachibana in view of Hawley

Claim 11 was rejected under 35 USC §103(a) as being unpatentable over Tachibana as applied to claims 1-10 and 12-14 and further in view of Hawley, G.G., The Condensed Chemical Dictionary, 10th Ed., Van Nostrand Reinhold Co., New York (1981), pages 121, 385, 434, and 686 (hereafter "Hawley"). The Office believes that Hawley teaches the preservatives that are lacking in Tachibana's disclosure and it would have been obvious to one of ordinary skill in the art at the time of the invention to add any one of the preservatives disclosed in Hawley to the composition of Tachibana for their known antimicrobial effects. Applicants respectfully traverse this rejection as the combined references do not teach or suggest all of the claim limitations, as required in MPEP 2143.03.

The Office Action does not establish a *prima facie* case because, as explained above, Tachibana fails to disclose the requisite limitations of Applicants' invention that deal with droplet size distribution and particle size. The mere addition of Hawley's disclosure of commonly used preservatives fails to remedy this shortcoming. Accordingly, Applicants respectfully assert that Hawley's disclosure of alleged well-known preservatives when viewed in combination with Tachibana would not have rendered Applicants' invention obvious since none of the benefits of the claimed composition are taught, suggested, or even recognized by either reference.

In view of the above, Applicants submit that claim 11 is patentably distinct from Tachibana and Hawley and Applicants request withdrawal of the rejection.

Conclusion

Applicants have made an earnest effort to place the present application in proper form and to distinguish the invention as claimed from the applied references. In view of the foregoing, Applicants respectfully request entry of the amendments presented herein, reconsideration of this application, and allowance of the pending claims.

Respectfully submitted,
THE PROCTER & GAMBLE COMPANY

By _____
Signature

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